



This document is scheduled to be published in the Federal Register on 11/03/2011 and available online at <http://federalregister.gov/a/2011-28558>.

6355-01-M

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 12-C0003]

Spin Master, Inc. and Spin Master, Ltd., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission

ACTION: Notice

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of 16 C.F.R. § 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Spin Master, Inc. and Spin Master, Ltd., containing a civil penalty of \$1,300,000.00.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by (insert date that is 15 calendar days from publication date).

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 12-C0003, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814-4408.

FOR FURTHER INFORMATION CONTACT: Seth B. Popkin, Lead Trial Attorney, Division of Compliance, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814-4408; telephone (301) 504-7612.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

October 26, 2011

(Date)

Todd A. Stevenson

Secretary

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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In the Matter of)	
)	
Spin Master, Inc.)	
)	CPSC Docket No. <u>12-C0003</u>
and)	
)	
Spin Master, Ltd.)	
)	

SETTLEMENT AGREEMENT

1. In accordance with 16 C.F.R. § 1118.20, Spin Master, Inc. (“SMI”) and Spin Master Ltd. (“SML”) (collectively “Spin Master”), and U.S. Consumer Product Safety Commission (“Commission”) staff (“Staff”), enter into this Settlement Agreement (“Agreement”). The Agreement and the incorporated attached Order (“Order”) settle staff’s allegations set forth below.

PARTIES

2. Staff is the staff of the Commission, an independent federal regulatory agency established pursuant to, and responsible for, the enforcement of the Consumer Product Safety Act, 15 U.S.C. §§ 2051–2089 (“CPSA”).

3. SMI is a corporation, organized and existing under the laws of Delaware, with its principal offices located in Los Angeles, California. At all relevant times, SMI imported and sold toys.

4. SML is a corporation, organized and existing under the laws of Canada, with its principal offices located in Toronto, Ontario, Canada. At all relevant times, SML developed and marketed toys.

5. At all relevant times, SMI was and is a wholly-owned subsidiary of Spin Master US Holdings, Inc., which is a wholly-owned subsidiary of SML.

STAFF ALLEGATIONS

6. From on or about April 16, 2007, to on or about November 7, 2007, SMI imported into the United States, sold to U.S. consumers, and sold to U.S. retailers, approximately 750,000 units of Aqua Dots. Aqua Dots were children's arts and crafts toys that consisted of tiny beads of different colors that stuck together when sprayed with water, allowing children to create various shapes and designs. Aqua Dots were marketed and sold in different kits with various accessories.

7. Aqua Dots are "consumer product[s]," and, at all relevant times, SMI was a "manufacturer" and "retailer" of those consumer products, and SML was a "manufacturer" of those consumer products, which were "distributed in commerce," as those terms are defined in CPSA sections 3(a)(5), (8), (11), and (13), 15 U.S.C. § 2052(a)(5), (8), (11), and (13).

8. By mid-October 2007, Spin Master had received reports that children and a dog had become ill and received emergency medical treatment after ingesting Aqua Dots; however, Spin Master failed to report to the Commission.

9. On October 18, 2007, Spin Master learned that Aqua Dots contained 1,4-butylene glycol ("TMG"). TMG is a chemical that, upon ingestion, metabolizes to gamma hydroxybutyrate (GHB), a Schedule I controlled substance. On October 19, 2007, Spin Master

received information that TMG is harmful if swallowed, and that, upon ingestion, it targets the kidneys and central nervous system.

10. In the days and weeks that followed, Spin Master continued to receive reports of children falling ill after ingesting Aqua Dots. The firm also received reports of children falling ill after ingesting a similar product manufactured by the same overseas factory using the same ingredients list containing TMG.

11. On November 2, 2007, Spin Master received a report that a child became ill after ingesting Aqua Dots. On November 5, 2007, Commission staff contacted Spin Master and notified them of that ingestion incident, which had occurred in October 2007.

12. On November 7, 2007, Spin Master, in cooperation with the Commission, voluntarily recalled the product.

13. In the press release announcing the recall, Spin Master acknowledged that “[c]hildren who swallow the beads can become comatose, develop respiratory depression, or have seizures.”

14. While the firm had enlisted an outside testing agency to evaluate the toxicity of the product, the testing was inadequate. Notwithstanding the testing results, the incident data reflective of human experience suggested that the product was toxic.

15. During the relevant time, Spin Master obtained information that reasonably supported the conclusion that Aqua Dots contained a defect or possible defect that could create a substantial product hazard, or that Aqua Dots created an unreasonable risk of serious injury or death. Accordingly, CPSA sections 15(b)(3) and (4), 15 U.S.C. § 2064(b)(3) and (4), required Spin Master to inform the Commission immediately of the defect and risk.

16. Spin Master knowingly failed to inform the Commission immediately about Aqua Dots, as required by CPSA sections 15(b)(3) and (4), 15 U.S.C. § 2064(b)(3) and (4), and as the term “knowingly” is defined in CPSA section 20(d), 15 U.S.C. § 2069(d). Under CPSA section 19(a)(4), 15 U.S.C. § 2068(a)(4), these failures constituted prohibited acts, and pursuant to CPSA section 20, 15 U.S.C. § 2069, subjected Spin Master to civil penalties.

17. Aqua Dots are “toxic” within the meaning of FHSA section 2(g), 15 U.S.C. § 1261(g), and are a “hazardous substance” within the meaning of FHSA section 2(f)(1)(A), 15 U.S.C. § 1261(f)(1)(A).

18. As a toy or other article intended for use by children that is a hazardous substance, or that contains a hazardous substance that is susceptible to access by a child to whom such toy or article is entrusted, Aqua Dots are a “banned hazardous substance” within the meaning of FHSA section 2(q)(1)(A), 15 U.S.C. § 1261(q)(1)(A).

19. During the relevant time, under FHSA § 5(c)(5), 15 U.S.C. § 1264(c)(5), Spin Master acquired knowledge that Aqua Dots were toxic and constituted a banned hazardous substance, and were prohibited from being imported and sold. Pursuant to FHSA section 5(c)(1), 15 U.S.C. § 1264(c)(1), Spin Master’s prohibited acts subjected it to civil penalties.

SPIN MASTER’S RESPONSIVE ALLEGATIONS

20. Spin Master denies staff’s allegations that Spin Master knowingly violated the CPSA and FHSA; and Spin Master denies any liability and wrongdoing.

21. Spin Master desires to settle this matter without the expense of litigation.

22. The Agreement and the payments made thereunder are made in compromise of disputed and unproven allegations and are not admissions of liability of any kind, whether legal or factual.

23. Spin Master, Inc. was the distributor of Aqua Dots in the United States, and was not involved in the design or manufacture, nor was it the creator or inventor, of Aqua Dots. Spin Master Ltd., located in Toronto, Canada, was the parent of Spin Master, Inc.

24. Spin Master had no involvement in the production of the product and was not given any insight into the chemical composition of the product, which at all times remained a closely guarded trade secret by the manufacturer.

25. Spin Master ensured the product underwent all legally required testing under FHSA regulations, CPSC lead content requirements, Canadian Hazardous Products regulations, and ASTM labeling standards before distribution of the product began, and the product passed all such testing. The distributor, SMI, began distributing the product in the United States in April 2007. Approximately 1,335,151 units of Aqua Dots were sold.

26. Spin Master went above and beyond all legally required testing and engaged a highly regarded independent testing agency to conduct live animal acute toxicity testing (“live animal testing”) on the product on June 6, 2007.

27. On August 10, 2007, Spin Master received and reasonably relied upon the official live animal testing results from the independent testing agency that stated: “[the product] MEETS the following requirement(s): Classification of not being toxic as defined in and tested

per 16 CFR 1500.3(c)(2)(i)(A), 'Acute oral toxicity' (FHSA regulations.)” SMI received oral confirmation of this test result as early as August 1, 2007.

28. It became apparent only after the November 7, 2007 recall that the live animal toxicity testing conducted by independent testing agencies was not performed at an appropriate standard of professional care.

29. In October 2007, Spin Master was advised of ingestion incidents arising from the ingestion of large quantities of a similar product and that governmental authorities in countries other than the United States had investigated those incidents and found that product to be safe.

30. On October 18, 2007, Spin Master was advised that the manufacturer of the product had switched the chemical formulation from 1,5 Pentamethylene Glycol to contain 1,4-Butylene Glycol (“TMG”). Upon being advised of the chemical switch, the distributor began investigating the product. On October 19, 2007, the distributor received a Material Safety Data Sheet (“MSDS”) for TMG.

31. On October 25, 2007, Spin Master was advised of the results of a Toxicological Risk Assessment performed by a board-certified toxicologist, which stated that none of the ingredients in the product were banned or restricted for use in consumer products in the United States, and that the product containing TMG would be safe under the FHSA regulations when used as intended or under circumstances involving reasonably foreseeable misuse, assuming that as many as 50 beads would be ingested in a single event. The distributor was also advised that 4 grams of the product, or 50 beads, would have to be consumed to cause significant harm by ingestion.

32. In early November 2007, Spin Master received a detailed report of an ingestion incident involving the product.

33. On November 7, 2007, Spin Master voluntarily recalled the product in conjunction and cooperation with the Commission.

AGREEMENT OF THE PARTIES

34. Under the CPSA and FHSA, the Commission has jurisdiction over this matter and, for purposes of this agreement only, over Spin Master.

35. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by Spin Master, nor does it constitute a determination by the Commission, that Spin Master knowingly violated the CPSA and FHSA, or a concession by either party of the accuracy of the representations set forth in the other party's Responsive Allegations.

36. In settlement of staff's allegations, Spin Master shall pay a civil penalty in the total amount of one million three hundred thousand dollars (\$1,300,000.00). The civil penalty shall be paid in two (2) installments as follows: six hundred fifty thousand dollars (\$650,000.00) shall be paid on or before January 10, 2012; and six hundred fifty thousand dollars (\$650,000.00) shall be paid on or before January 10, 2013. Both payments shall be made electronically to the Commission via: www.pay.gov.

37. Upon provisional acceptance of the Agreement, the Agreement shall be placed on the public record and published in the *Federal Register*, in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). In accordance with 16 C.F.R. § 1118.20(f), if the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar

days, the Agreement shall be deemed finally accepted on the sixteenth (16th) calendar day after the date it is published in the *Federal Register*.

38. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, Spin Master knowingly, voluntarily, and completely waives any rights it may have in this matter to the following: (1) an administrative or judicial hearing; (2) judicial review or other challenge or contest of the validity of the Order or of the Commission's actions; (3) a determination by the Commission of whether Spin Master failed to comply with the CPSA, the FHSA, and their underlying regulations; (4) a statement of findings of fact and conclusions of law; and (5) any claims under the Equal Access to Justice Act.

39. The parties may publicize the terms of the Agreement and the Order.

40. The Agreement and the Order shall apply to, and be binding upon, Spin Master and each of its successors and assigns.

41. The Commission issues the Order under the provisions of the CPSA and FHSA, and violation of the Order may subject Spin Master and each of its successors and assigns to appropriate legal action.

42. The Agreement may be used in interpreting the Order. The Agreement constitutes the entire agreement and understanding between the parties related to the subject matter contained herein and is subject to the terms of the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. The Agreement shall not be waived, amended, modified, or otherwise altered without written agreement thereto, executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

43. If any provision of the Agreement and the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and Spin Master agree that severing the provision materially affects the purpose of the Agreement and the Order.

SPIN MASTER, INC.

Dated: October 19, 2011 by:

Ronnen Harary, Director and CEO
5890 West Jefferson Boulevard, Suite E
Los Angeles, CA 90116

SPIN MASTER LTD.

Dated: October 19, 2011 by:

Ronnen Harary, Director and CEO
450 Front Street West
Toronto, Ontario

Dated: October 19, 2011 by:

Ronald Y. Rothstein, Esq.
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
Counsel for Spin Master, Inc.
and Spin Master Ltd.

Dated: October 19, 2011 by:

Frederick B. Locker, Esq.
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420 5th Avenue, Suite 2602
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Counsel for Spin Master, Inc.
and Spin Master Ltd.

U.S. CONSUMER PRODUCT SAFETY
COMMISSION STAFF
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Assistant General Counsel

Dated: October 19, 2011 by:

Seth B. Popkin
Lead Trial Attorney

Renee McCune
Attorney

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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In the Matter of)	
)	
Spin Master, Inc.)	
)	CPSC Docket No. <u>12-C0003</u>
and)	
)	
Spin Master Ltd.)	
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ORDER

Upon consideration of the Settlement Agreement entered into among Spin Master, Inc. and Spin Master Ltd. (collectively “Spin Master”), and the U.S. Consumer Product Safety Commission (“Commission”) staff, and the Commission having jurisdiction over the subject matter and, for purposes of this agreement only, over Spin Master, and it appearing that the Settlement Agreement and the Order are in the public interest, it is

ORDERED, that the Settlement Agreement be, and hereby is, accepted; and it is

FURTHER ORDERED, that Spin Master shall pay a civil penalty in the total amount of one million three hundred thousand dollars (\$1,300,000.00). The civil penalty shall be paid in two (2) installments as follows: six hundred fifty thousand dollars (\$650,000.00) shall be paid on or before January 10, 2012; and six hundred fifty thousand dollars (\$650,000.00) shall be paid on or before January 10, 2013. Both payments shall be made electronically to the Commission via: www.pay.gov. Upon the failure of Spin Master to make any of the foregoing payments when due, the total amount of the civil penalty shall become due and payable immediately, and interest on the unpaid amount shall accrue and be paid by Spin Master at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b).

Provisionally accepted and provisional Order issued on the 26th day of October, 2011.

BY ORDER OF THE COMMISSION:

Todd A. Stevenson, Secretary
U.S. Consumer Product Safety Commission

[FR Doc. 2011-28558 Filed 11/02/2011 at 8:45 am; Publication Date: 11/03/2011]